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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by SBC Communications, Inc.	)	
for Authorization Under Section 271 of the	)	CC Docket No. 97-121
Communications Act To Provide In-Region	)	
InterLATA Service in the State of Oklahoma	)	
	)	

REPLY COMMENTS OF AT&T CORP. IN OPPOSITION TO SBC'S SECTION 271 APPLICATION FOR OKLAHOMA

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AT&T Corp. and AT&T Communications of the Southwest, Inc. ("AT&T") respectfully submits this reply to the comments on the application of SBC Communications, Inc. et al. ("SBC") for authorization to provide interLATA services originating in Oklahoma.

INTRODUCTION AND SUMMARY

The comments have vividly confirmed that SBC's Oklahoma application should be denied, regardless of whether it is analyzed under the strict standards of Track A of § 271 or the less stringent standards of the Track B exception to § 271's general rule.

The dispositive fact is that no commenter, including the Oklahoma Corporation Commission ("OCC"), maintains that SBC could be found to have satisfied the competitive checklist in Oklahoma under either standard. To the contrary, the comments of the Justice Department, the OCC, and every other party to address the matters have shown that SBC has not made the checklist items commercially available in Oklahoma, and thus cannot be found even to be "generally offering" the required access and interconnection in accord with the Act's requirements. Accordingly, the instant application would have to be denied even if Track B could apply, and the Commission need not even address either the RBOCs' untenable claims that Track A is inapplicable or the other legal arguments that have been raised.

The Justice Department's comments make these points explicit. In particular, because of an unwarranted concern that some checklist items may not be used and that an RBOC might not have a remedy in that event, the Justice Department takes the position that Track A's requirement that an RBOC "is providing" all the checklist items should be construed to require only that the RBOC has genuinely made them commercially available and thus to be identical to Track B's requirement that the RBOC is "generally offer[ring]" the checklist items.[1] Because the Justice Department also makes detailed and irrefutable showings that numerous checklist items are not now generally commercially available from SBC, the Department has demonstrated that SBC's application would be fatally defective even if Track B could apply.

Similarly, while the OCC has urged that the application be granted, it relies on "policy" grounds that violate § 271: e.g., its view that it will foster local competition to allow RBOC entry before the checklist is satisfied. In this regard, the OCC's comments confirm that SBC cannot today be found to have provided the checklist items or made them commercially available pursuant to SBC's statement of generally available terms and conditions ("SGAT") or otherwise. For example, the OCC candidly states that it has not determined that SBC's SGAT complies with the requirements of § 251(c) and § 252(d), and the OCC does not dispute that the SGAT violates the Act's requirements in each of the numerous respects identified by AT&T, the Department, and others. Even more pertinently, the OCC acknowledges that numerous items on the checklist have been requested but have not been provided commercially and that future regulatory action or good faith negotiations will be required before SBC will be making these

[1] See Evaluation of the United States Department of Justice, CC Docket No. 97-121 ("DOJ Comments") at 23-24.

items available on the rates, terms, and conditions that § 251 require. These statements and findings of the OCC independently establish that the checklist has not been satisfied and confirm the detailed findings of the Department of Justice and other parties.

AT&T's Reply Comments will be divided into two Parts. Part I will address the OCC's Comments. It will demonstrate that quite apart from the substantive and procedural deficiencies that preclude the Commission from giving any weight to the OCC's statements of support for the application, the OCC's Comments and findings establish that SBC could not be found to satisfy the checklist even if Track B could here apply.

Part II will address the various other claims about the scope and applicability of Track A that need not be reached to decide SBC's application, but that the RBOCs and other commenters have raised. The most extreme of these claims is the RBOCs' contention that Congress intended that they be allowed to avoid the general rule of Track A of § 271 and proceed under the exception established by Track B unless access and interconnection had somehow been requested by a firm that was already a full-fledged facilities-based local competitor that satisfied all the requirements of § 271(c)(1)(A) of the Act. In addition, the Justice Department, the OCC, and the RBOCs all make the "narrower" claims that Track A should not require either that there be competing facilities-based residential services or that each checklist item be actually "provided" by an RBOC.

As explained below, each of these claims is contrary to § 271's terms and purposes. Moreover, each claim is a misguided attempt to address the purported concern that the RBOCs otherwise could be held "hostage" to a CLEC's business plans and prevented from obtaining long distance authority even when they have taken the necessary steps to open their

exchanges to competition and interLATA authority is otherwise in the public interest. Quite apart from the fact that CLECs are aggressively pursuing all checklist items in each state in the nation, the RBOCs would have fully adequate remedies before the appropriate state commission and this commission alike if individual checklist items were not requested or the required facilities-based competition did not develop. There is thus no reason even to consider contorting the statutory scheme to address the purely hypothetical concerns of some commenters.

I. THE COMMENTS OF THE OKLAHOMA CORPORATION COMMISSION HAVE DEMONSTRATED THAT SBC IS NEITHER PROVIDING NOR GENERALLY OFFERING THE ITEMS ON THE COMPETITIVE CHECKLIST OF § 271(c).

The fundamental prerequisite to interLATA authority is that an RBOC demonstrate that it has satisfied the competitive checklist of § 271(c)(2)(B) either by showing that it "is providing" access and interconnection arrangements on rates, terms, and conditions that satisfy § 251(c), § 252(d), and the rest of § 271(c)(2)(B) (Track A) or that it is "generally offering" these arrangements pursuant to an SGAT (Track B, if applicable). In this application, SBC sought to make these showings by partially relying on the interconnection agreements that it has entered into with Brooks Fiber, ICG Telecom, and Sprint as well as the SGAT that took effect shortly before the application was filed (and that incorporates the provisions of prior interconnection agreements). However, these interconnection agreements address only some checklist items, and because they further are "voluntary" negotiated agreements, the OCC could not and did not determine that the rates, terms, and conditions in these agreements complied with § 251(c) and § 252(d) when it previously approved the agreements. See §§ 252(a)(1) & (e)(2)(A). Accordingly, the application attempts to show that SBC's SGAT complies with these

requirements and that SBC is generally offering the required interconnection and access pursuant to this SGAT.

As noted above, the Justice Department has submitted a detailed evaluation that concludes that SBC has neither made this showing of checklist compliance nor satisfied § 271's other prerequisites to interLATA authority. By contrast, the OCC has, by a 2-1 vote, rejected the recommendation of its own Administrative Law Judge ("ALJ"), its staff, and the Oklahoma Attorney General, and filed an 11-page set of comments that urge the Commission to grant SBC's application. These comments were submitted by the OCC ostensibly to allow the Commission to discharge its statutory duty to "consult" with the state commission in order to "verify" the RBOC's compliance with the competitive checklist. See § 271(d)(2)(B).

However, the OCC has not even attempted to verify SBC's compliance with all the items on the checklist. Moreover, even if the OCC had done so, the reality is that it has not conducted the kind of proceeding that the Commission and the Justice Department have urged and that would enable the Commission to find that each and every checklist item is either being provided or is commercially available. For example, in contrast to the commissions in Illinois, Wisconsin, New York, Georgia, and other states, the OCC did not conduct an evidentiary hearing in which the RBOC's personnel were examined and cross-examined or even deposed.[2]

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[2] In particular, while "[t]he FCC and DOJ recommended that a full evidentiary hearing be conducted," the OCC refused to do so. See Dissenting Opinion of Commissioner Bob Anthony, OCC Cause No. PUD 97-64 at 3. The OCC did not require that SBC produce the sworn testimony of a single witness, nor require that it present a single witness for cross-examination. Indeed, SBC successfully objected to producing a single witness even for deposition. See Report and Recommendation of the ALJ, OCC Cause No. PUD 97-64 ("ALJ Report and Recommendation") at 3-4.

(continued...)

To the contrary, the OCC here followed procedures that assured it acted on a factual record that was radically incomplete and that was expressly designed to allow SBC's counsel to urge "policy" views, not to "verify" whether SBC has in fact implemented the requirements of § 251(c) and the rest of § 271's competitive checklist.[3]

Accordingly, the OCC's order and comments do not discuss the individual checklist items and verify that SBC has satisfied any of the individual items -- much less all of them. Instead, the OCC discusses "policy" arguments why current compliance should not be a precondition to long distance authority.

When the OCC's conclusory comments are stripped of these erroneous legal and "policy" arguments, they confirm that SBC is not in compliance with the competitive checklist in Oklahoma -- as its own ALJ and staff have found. Indeed, the OCC relies on facts that establish that SBC cannot be found to be providing or offering interconnection and access that

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[2] (...continued)

The "evidentiary" hearing before the ALJ occurred on a single day, and only a single Brooks Fiber witness was orally examined and cross examined. By contrast, SBC produced no witnesses or sworn written testimony on its behalf, and waived the right to cross-examine witnesses from AT&T who had presented written testimony that demonstrated that the checklist had not been satisfied and who were present at the hearing. See Transcript of Proceedings, OCC Cause No. PUD 97-64 (Apr. 15, 1997) ("OCC Transcript of April 15, 1997") at 62-70.

[3] Chairman Graves blessed the OCC's procedures on the ground that the OCC was acting as an arbiter of policy disputes, not as a fact finder, noting at one point: "Quite frankly if somebody asked me about depositions and all that I would have suggested early on that there is no reason to go through that, we probably ought to just have counsel stand up and make policy arguments as to where they are and, you know, you allow people to refute back and forth and then we make a judgment ... ." Transcript of Proceedings, OCC Cause No. PUD 97-64 (Apr. 23, 1997) ("OCC Transcript of April 23, 1997") at 13. That is why Commissioner Anthony concluded that the OCC had "fail[ed] to provide a proper evidentiary record to the FCC." Dissenting Opinion at 3.

accords with § 251's requirements. That is why the OCC's recommendations ultimately rest on "policy" grounds that were rejected by Congress in § 271.

A. The Facts Identified By The OCC Establish That SBC Has Not Satisfied The Competitive Checklist For Either A Track A Or A Track B Application.

The OCC here purported to analyze the application under the criteria of Track A of § 271. However, in assessing whether SBC has satisfied the competitive checklist, the OCC asked whether SBC was "providing" or "generally offering" each item, and the OCC relied on SBC's SGAT as well as the provisions of interconnection agreements that are incorporated in the SGAT.[4] So the OCC was here actually applying the criteria of Track B, and its statements demonstrate that SBC could not now be found even to be "generally offering" each item on the competitive checklist.

In its proceeding on SBC's § 271 application, the OCC was reviewing the factual findings of its own ALJ that SBC "does not currently provide all checklist items" or make those that it does provide "easily and equally accessible, on commercially operational terms and on equal terms to all."[5] For example, the ALJ generally concluded:

> SBC must provide items in such a manner that all carriers have an equal ability to compete. That threshold level has not been demonstrated in this case. The evidence in this case indicates that there are currently impediments and blockades to local competition in Oklahoma.[6]

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[4] See Comments Of The OCC On The Application Of SBC Communications, Inc., Southwestern Bell Telephone Company And Southwestern Bell Long Distance for Provision Of In-Region InterLATA Services In Oklahoma (filed May 1, 1997) ("OCC Comments") at 6-7.

[5] ALJ Report and Recommendation at 35.

[6] ALJ Report and Recommendation at 36.

Because SBC had clearly not satisfied a number of items, the ALJ found it unnecessary to evaluate SBC's compliance with each of the checklist items one by one. "[B]y way of example," the ALJ found based on the evidence "that SBC is not providing interim number portability, a process for collocation, or directory assistance" as required by the Act, and that "certain aspects of OSS" would not be available from SBC until at least July 1997.[7] The ALJ also found that SBC had not established that its rates were based on cost.[8]

The OCC did not reject any of the ALJ's factual findings about what SBC was and was not doing and did not evaluate the checklist items one by one. To the contrary, the OCC concluded that the current shortcomings in SBC's checklist implementation should not, as a matter of "policy," preclude immediate long distance authority. It concluded that SBC should be allowed to provide long distance services now because there are "adequate safeguards . . . in place to assure that [SBC] will continue to negotiate in good faith" and will fix the problems that now exist. OCC Comments at 10. In particular, the OCC relied on the fact that it will be "vigilant" in acting on future "complaints of substance" and in "guarding against any impediment to full competition by any party." Id.

In this regard, there are four separate respects in which even the OCC's conclusory comments have made it explicit that SBC is not today in compliance with the checklist. In each, the OCC is relying on future regulatory proceedings and/or "good faith negotiations" to end SBC's current state of non-compliance.

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[7] ALJ Report and Recommendation at 36.

[8] Id. at 36.

First, that is the case with the provisions of the SGAT itself, even apart from the separate question of whether its arrangements are commercially available. The OCC correctly states that it has not yet "approved" SBC's SGAT, but "will continue its review of it . . . consistent with the provisions of Section 252(f)(4)." OCC Comments at 7. Under § 252(f)(4), that approval can occur only if the OCC hereafter determines that the stated terms, conditions, and prices in the SGAT "complies with [§ 252(d)] and Section 251 and the regulations thereunder" (see § 252(f)(4)). So by admitting that it has not approved the SGAT, the OCC has admitted that it has not found that the SGAT complies with § 251(c) and § 252(d) and that the OCC has not verified SBC's compliance with the checklist. Because SBC's application depends on its SGAT, the admission of the OCC itself is dispositive.

Beyond that, the OCC does not dispute the showings of AT&T, the Department, and other parties that there are numerous respects in which the SGAT's provisions flagrantly the requirements of § 251(c) and § 252(d). In the OCC's view, it is enough that any such deficiencies in the SGAT will be corrected in the future regulatory proceedings in which the OCC promises to be "vigilant." But that is plainly erroneous. No Track B application can be granted unless the SGAT itself is first found to comply with § 251 and § 252(d) (and the SGAT's provisions are separately then shown to be commercially available now pursuant to that SGAT). Long distance authority cannot be granted on the basis of regulatory or other promises that compliance with § 251(c) will occur in the future.

Second, the rates in the SGAT palpably have not been found or shown to be based on cost, as required by § 252(d), or to be "just, reasonable, and non-discriminatory," as required by § 251(c).

These points, too, are confirmed by the OCC's Comments, for the OCC does not assert, and could not assert, that there has been a finding that the rates contained in SBC's SGAT are cost-based. To the contrary, the most that the OCC can say (OCC Comments at 9) is that "the fact that rates are 'interim' does not mean that they are not cost-based." That is true as a matter of logic, but irrelevant to the question whether the rates at issue are in fact cost-based and have been so found, as these have not.

Similarly, it is irrelevant that when SBC proposed some of these same rates in the earlier AT&T arbitration proceeding, they were "supported by cost studies made available by SWBT to the OCC's staff and to AT&T." OCC Comments at 9 (emphasis added). Again, that SBC developed cost studies that were claimed to support some of its proposed rates does not establish that the studies were valid or that the proposed rates were in fact cost-based. That is especially so because AT&T had proposed lower rates that were supported by other cost studies, and the arbitrator expressly refused to "find that SWBT's rates were cost-based." See AT&T Comments, Rhinehart Aff., ¶ 17. Instead, the arbitrator adopted SBC's proposed rates because he believed it was infeasible to determine cost-based rates in that proceeding and because he determined it was preferable to adopt the highest of the proposed rates (SBC's), for in the event of a future true-up, it "'would be easier to explain'" a reduction in the rates "'rather than trying to explain a lower price being trued-up to a higher price.'" Id. (quoting arbitrator's order). The OCC made no additional or different findings in its review of this arbitration decision.[9]

[9] Application of AT&T Communications of the Southwest, Inc., for Compulsory Arbitration of Unresolved Issues With Southwestern Bell Telephone Company Pursuant To § 252(b) of the Telecommunications Act of 1996, OCC Cause No. PUD 96-218, Order No. 407704 (Dec. 12, 1996).

In this regard, it is precisely because these rates were not found to be cost-based that the arbitrator and the OCC have deferred the setting of the actual cost-based rates to a future permanent rate proceeding and have provided that the interim rates would take effect only subject to a future true-up. Nor is it relevant to this § 271 application that AT&T had agreed to this procedure in its arbitration proceeding (see OCC Comments at 9), for AT&T did so because the Arbitrator concluded it was infeasible at this time to set cost-based rates and because AT&T believed it was better to have interim rates that were subject to true-up than to have no rates at all.

In addition, the AT&T arbitration proceeding addressed only some of the rates that are in the SGAT. As the OCC states (OCC Comments at 9), the other rates in the SGAT were not adopted in that proceeding and were not supported by any cost studies. Rather, they were taken from state or federal tariffs or from negotiated agreements that were approved without a determination that the rates satisfied the standards of § 252(d). See §§ 252(a)(1) & (e)(2)(A).

Accordingly, there likewise have been no cost studies submitted in the proceeding that the OCC instituted (but has not concluded) on the validity of the SGAT under federal law. Nor were there any such studies in the proceedings it conducted in connection with this § 271 application. That confirms that no findings could have been made or have been made on question whether the rates in the SGAT are cost-based.

Finally, the OCC does not claim, and could not claim, that the promise of a future true-up is sufficient to satisfy the requirements of §§ 271(c)(2)(B)(1) & (2) that interconnection and access to network elements be currently available on rate, terms, and conditions that satisfy

the standards of § 252(d) and § 251(c). That is especially so because there is no current timetable for the completion of the permanent rate proceedings in Oklahoma (which are not due even to start until later this summer or conclude earlier than February, 1998) and because no particular methodology or cost study has yet been adopted to govern this cost proceeding. Rhinehart Aff., ¶¶ 17-18. In the interim, the above-cost prices will pose a significant impediment to market entry for CLECs, and will inevitably reduce competition in the local exchange market. See id., ¶ 55.

That point is graphically illustrated by SBC conduct that occurred after AT&T's initial comments were filed. In particular, SBC has recently proposed charges for customized routing of $351,634 plus additional charges per end office of up to $34,007 (with SBC refusing to provide any specific cost support for its pricing), and AT&T calculates that SWBT's proposed rates would require an expenditure of between $15 and $20 million to activate customized routing in Texas alone.[10] These rates are so high that even if they were accepted only as interim rates by a state commission and were subject to later true-up, few if any carriers could afford the risk of accepting these terms, with only the hope of recouping some of the payments at a later date.

Third, the OCC's comments cryptically acknowledge the problems that Brooks Fiber and Cox Communications have had in obtaining physical collocation, unbundled loops, number portability, and other arrangements that are requirements of § 251(c) and that are necessary for these carriers to offer competing services in the manner they deem to be most

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[10] See Letter of May 14, 1997 from Bill Schinder, SBC, to Nancy Dalton, AT&T (attached as Exhibit 1 to this Reply); Letter of May 15, 1997 from Nancy Dalton, AT&T, to Bill Schinder, SBC (attached as Exhibit 2 to this Reply).

efficient. See OCC Comments at 6. These problems are discussed in detail in the Department's comments. See DOJ Comments at 26-36. Yet the OCC tries to dismiss these failures by SBC on the ground that "start-up" problems are normal, that the OCC determined that these problems are "of an implementation nature due to miscommunication by both Brooks and SBC," and that SBC's good faith and the OCC's processes will be sufficient to assure future implementation. OCC Comments at 6.

But these OCC findings confirm that SBC is not currently complying with the checklist. Section 271 precludes relief unless checklist items that satisfy the Act are now actually provided (Track A) or commercially available (Track B, if applicable). Relief cannot be granted on the basis of predictions that "implementation" problems will be solved in the future. Moreover, in view of the actual facts reported by the Department, it is apparent that the OCC is ignoring SBC's duty under § 251(c) to provide these arrangements on the same terms as they are available to itself.[11] Unless and until there are processes in place that allow Brooks and other CLECs to obtain unbundled elements and other arrangements on the same terms as the RBOC -- without incurring start-up, coordination, and the other implementation problems that do not apply to the RBOC itself -- the checklist has not been satisfied.

Fourth, and perhaps most fundamentally, the OCC acknowledges that SBC has, to date, steadfastly failed, through a variety of devices, to provide AT&T and other new entrants with the combination of unbundled elements and other arrangements that are required by § 251(c) and that they have requested. See OCC Comments at 8. Once available in

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[11] See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order (rel. 8/8/96) ("Local Competition Order") at ¶¶ 307-316.

competitively significant volumes, these arrangements would themselves allow AT&T and others to offer competitively significant alternatives to SBC throughout Oklahoma.

In attempting to dismiss these facts, the OCC is confirming the violation of the checklist. In particular, the OCC relies on the grounds that Brooks and the other entities with whom SBC has agreements have not requested the same checklist items and that SBC does not yet have an interconnection agreement with AT&T and the other parties who have requested these additional checklist items. In the OCC's view, AT&T and these other CLECs thus cannot here be heard to complain about the denials of the interconnection arrangements that they want. See OCC Comments at 8. That is simply wrong. Section 271(c)(2)(B)(i) & (ii) requires "interconnection" and "[n]ondiscriminatory access to network elements in accordance with the requirements of Sections 251(c)(3) and 251(d)(1)." And § 251(c) prohibits an RBOC from discriminating in favor of some entrants (e.g., those it regards as less potent competitive threats) and against other entrants (e.g., those who are believed to be more effective potential competitors). Thus, the conceded discrimination against AT&T and other CLECs independently forecloses SBC from satisfying the checklist.

Similarly, the OCC is simply wrong that the denials of the requests of AT&T and other CLECs are matters only for future arbitration or other regulatory proceedings. See OCC Comments at 8-9. Combinations of network elements are patently not commercially available today in accord with the requirements of § 251(c) and the Commission's regulations. See AT&T Comments at 21-28. Unless and until they are, the checklist is not satisfied, regardless of whether the application proceeds under Track A or Track B. In short, rather than "verify" SBC's compliance with the checklist, the OCC's comments have confirmed the findings of its

own ALJ, the Justice Department, and others, that these checklist items are neither being provided nor generally offered in accord with the Act's requirements and that this application is barred by § 271's terms.

B. The OCC's Recommendation Is Based On "Policy" Judgments That Conflict With The Terms And Purposes Of Section 271.

Accordingly, the only way the OCC can support SBC's application is by making "policy" arguments that are contrary to § 271's terms and purposes. Indeed, the OCC had made it clear throughout its proceedings that it viewed its role as an arbiter of competing policy claims under state law, not as a fact-finder that was determining whether SBC is now providing or generally offering the checklist items in accord with the terms of federal law. See p. 6 n.3, supra. The OCC's comments rely on two related "policy" views. Each is contrary to the requirements of § 271.

First, the OCC concluded that the current commercial availability of checklist items is not necessary. In its view, it is sufficient that the OCC will be able to force SBC's compliance in future complaint proceedings and that "adequate safeguards are [thus] in place to assure" that SBC will implement the requirements and "negotiate" the necessary arrangements in good faith. OCC Comments at 10. In this connection, the OCC "specifically reject[ed] the notion" that RBOCs will lose the "incentive to negotiate in good faith with potential competitors" if the RBOCs are permitted to enter long distance markets before they have irreversibly put in place the mechanisms that will allow new entrants to obtain access to essential RBOC facilities on the same terms and conditions as the RBOCs enjoy. Id. As Chairman Graves explained:

> [T]he underlying theme that every opponent of this application made was if you do this you give up leverage in local markets and you'll never be able to see competition come to local markets

> .... And I disagree fundamentally with that because that is not the case. Access to local markets will go on and will occur regardless of whether Southwestern Bell gets into the long distance market or not.[12]

Second, the OCC similarly concluded that the best way to promote competition in the local market for telephone service is to grant SBC's application for in-region interLATA authority, even before the checklist is available.

> The OCC believes that once full long distance competition is opened in Oklahoma, the major competitive providers of local exchange service will take notice and adjust their respective business plans to move Oklahoma close to the top of their schedules, resulting in faster and broader local exchange competition for Oklahoma consumers. OCC Comments at 11.

The OCC appeared also to believe that this would have no adverse effects on long distance competition in the interim.

However, Congress has unambiguously rejected each of the OCC's two "policy" judgments. Section 271 prohibits premature RBOC entry because that would both retard the development of local competition and allow RBOCs to monopolize segments of interLATA markets. As the Commission has stated, the Act "links the effective opening of competition in the local market with the timing of RBOC entry into the long distance market," by requiring "compliance with the competitive checklist ... as a prerequisite to RBOC provision of in-region interLATA service."[13] As the Commission has found, "incumbent LECs have no economic

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[12] Transcript of Proceedings, OCC Cause No. PUD 97-64 (Apr. 25, 1997) ("OCC Transcript of April 25, 1997") at 19-20; accord, OCC Comments at 10.

[13] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No.96-149, First Report and Order and Further Notice of Proposed Rulemaking (rel. Dec. 24, 1996) at ¶ 8 ("Non-Accounting Safeguards Order").

incentive, independent of the incentives set forth in sections 271 and 274 of the 1996 Act, to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services."[14] The Common Carrier Bureau has thus similarly stated that premature entry into the interLATA market would eliminate the "powerful incentive" an incumbent LEC otherwise has to cooperate in opening local exchange markets to competition.[15]

In this regard, the Act requires satisfaction of the checklist and § 271's other requirements before there can be interLATA entry precisely because Congress recognized -- as the Justice Department explains[16] -- that after-the-fact regulatory review cannot effectively deal with the multitude of intractable problems that must be ironed out before all checklist items are genuinely available. Indeed, SBC is now taking the position that "the Telecommunications Act of 1996 . . . does not provide State commissions with any jurisdiction or authority to address post-arbitration and post-interconnection agreement disputes," and that state commissions otherwise can have "no jurisdiction over such disputes."[17]

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[14] Local Competition Order ¶ 55.

[15] In the Matter of Petition for Declaratory Ruling Regarding US West Petitions to Consolidate LATAs in Minnesota and Arizona, DA97-767, ¶¶ 25, 28 (Rel. Apr. 21, 1997).

[16] "[I]t would surely be difficult for the Commission, or state regulators, to compel adequate wholesale support processes to be developed on an efficient and nondiscriminatory basis through regulation alone. Regulatory and judicial proceedings over claims of discrimination and failure to provide access can be drawn out for years by RBOCs unwilling to cooperate with competitive entry into their local markets. The difficultly of effectively regulating against discrimination in this context is well documented in practice, and in economic literature." DOJ Comments at 45-46 (footnotes omitted).

[17] Review of Commission's Dispute Resolution Rules §§ 22.301-22.310, PUC of Texas, Project No. 17329, Southwestern Bell Telephone Company's Comments (filed May 7, 1997).

In short, the OCC's Comments have confirmed that SBC cannot be found to have satisfied the competitive checklist -- regardless of which Track of § 271 applies. Because the OCC has further urged that the application can be granted only on the basis of "policies" that violate § 271's express terms and purposes, it has demonstrated that the application should be denied.

II. TRACK A HAS NOT BEEN SATISFIED AS A MATTER OF LAW; TRACK B IS HERE INAPPLICABLE, AND THE ACT WILL NOT PERMIT AN RBOC TO BE "HELD HOSTAGE" TO ANY CLEC'S BUSINESS PLANS.

While SBC's pervasive failure to satisfy the checklist means that the application can be denied without addressing any other issues, the comments have advanced three other claims that relate to the applicability and scope of the other provisions of Track A and Track B and that warrant responses. First, the RBOCs claim that Track A is inapplicable and that Track B automatically applies unless interconnection and access have been requested by firms that are already competing facilities-based providers of residential and business service that satisfy all the terms of § 271(c)(1)(A) in that state. Second, the Justice Department, the OCC, and the RBOCs claim that Track A does not require facilities-based residential services competition (DOJ) or even actual resale competition (OCC). Finally, the Justice Department and the RBOCs claim that Track A does not require a showing that the RBOC is providing each checklist item.

While these contentions raise discrete statutory issues, each ultimately rests on a single concern: that unless the proposed constructions of Track A or Track B are adopted, RBOC applications for interLATA authority will be held "hostage" to the business plans of CLECs. In particular, the concern is that an RBOC may take all the steps required to permit the immediate development of competitively significant statewide alternatives to the RBOCs'

exchange services but be blocked from obtaining long distance authority because (1) residential service is not offered at all or is not offered predominantly over a CLECs' own facilities, (2) all items on the competitive checklist are not requested or used by CLECs, or (3) no form of facilities-based competition emerges.

Because all the specific contentions that are addressed below relate to this single concern, it is important to emphasize at the outset that the concern rests on premises that are false, both factually and legally.

First, there is no factual basis for the concern. It is the case in Oklahoma, as it is in the nation as a whole, that multiple CLECs are aggressively pursuing all the items on the competitive checklist and making substantial investments to establish physical alternatives to LEC loop, switching, and transport facilities for residential and business customers alike. While it is certainly true that no single CLEC has the financial, technical, and other resources required immediately to provide local service throughout the nation, there are multiple CLECs that can each enter the substantial majority of the states and that collectively can serve the entire nation. It thus would be sheer and unfounded conjecture to assert now that physical alternatives to LEC networks will not develop in any state.

In addition, the Commission has held that carriers who use combinations of unbundled network elements are facilities-based carriers within the meaning of Section 214(e) of the Act,[18] and SBC and other RBOCs have argued that an RBOC's unbundled network elements should be deemed to be a CLEC's "own facilities" under § 271(c)(1)(A) as well. But

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[18] In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, ¶ 168 (adopted May 7, 1997); see id., ¶¶ 150-167.

AT&T has elsewhere demonstrated that the CLECs who use only these arrangements cannot be treated as facilities-based carriers for purposes of § 271 as a matter of law.[19] Further, it is also the case that unbundled elements could never be equivalent to a CLEC's own facilities as a matter of economics unless CLECs were assured of obtaining the access to the unbundled facilities at their own economic cost and were afforded the OSS interfaces and other wholesale arrangements necessary to give CLECs the same ability to use combinations of elements that the RBOC itself enjoys.

At the same time, if the RBOCs were ever to prevail on their claim that unbundled network elements are to be treated as a CLEC's "own" facilities within the meaning of Section 271 in these circumstances, then the concerns that facilities-based competition might not develop would be truly preposterous. In that event, it would be even more certain that there would be widespread competition that would be deemed facilities-based competition by the Commission and the RBOCs alike once the items on the competitive checklist are commercially available in accord with the requirements of § 251(c), § 252(d), and the Commission's implementing regulations.

Nor is there any basis for the purported concerns that CLECs would delay their local entry to slow the RBOCs' entry into long distance. Many CLECs are not interexchange carriers and have no possible incentive to delay entry. In consequence, there also is no way that interexchange carriers could themselves delay RBOC entry by failing to take the available steps

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[19] See AT&T's Response to PacTel's Section 271 Guidebook, pp. 2-13 (submitted to Commission on September 13, 1996); Letter of December 13, 1996, from David W. Carpenter on behalf of AT&T, to Donald Russell, DOJ, regarding Competitive Impact of Bell Operating Companies' Entry Into Long Distance.

to offer competitively significant local services of their own. In short, there is no likelihood that interexchange carriers or other CLECs will delay their own entry once the necessary conditions are in place.

Second, in all events, the RBOCs' purported concerns also rest on the false legal premise that RBOCs would not have fully adequate legal remedies if checklist items were not used or if facilities-based competition did not develop. Section 271(c)(1)(B) and other provisions of the Act make it explicit that an RBOC that takes all the necessary steps to open up its exchange networks cannot be denied interLATA authority when it is otherwise in the public interest. Even if the general rule of Track A is strictly enforced -- as it must be -- the Track B exception is available if (1) if a state certifies that a CLEC has failed to negotiate in good faith, or (2) if a CLEC has violated the terms of an implementation schedule.

These remedies are themselves sufficiently flexible to protect any legitimate interests of an RBOC. Thus, although it is the case that interconnection agreements generally do not now have the statutorily required implementation schedules (see § 252(c)(3)), that is because the RBOCs generally have not been in the position to predict when they would implement the OSS interfaces and other requirements of § 251 that must be in place before CLECs could place competitively significant volumes of orders. So it was not previously possible for all states to prescribe implementation schedules that would bind RBOCs and CLECs. However, RBOCs should soon increasingly be in positions to provide the necessary information on their timetables for OSS compliance and similar matters, so states will soon be able to prescribe the implementation schedules that are required by Section 252(c)(3) of the Act. For these and other reasons, the staff of the Illinois Commerce Commission has also taken the

position that the statutorily required implementation schedules can hereafter be implied by law into the interconnection agreements and enforced.[20]

Accordingly, there is no reason for the Commission now even to consider departing from the plain terms and purposes of Section 271. In the unlikely and now purely hypothetical event that CLECs ever fail to take advantage of actual commercial opportunities to become facilities-based competitors to residential and business customers, the Act provides flexible remedies. Accordingly, if the Commission now considers the three legal issues that are discussed below, the only question should be whether the claims of the RBOCs, the OCC, and the Justice Department are consistent with Track A's terms and purposes. As explained below, they palpably are not.

A. Because Track A Does Not Require That Full-Fledged Facilities-Based Competitors Have Requested Access And Interconnection, Track A Is Here Fully Applicable.

First, the broadest and most extreme of the proposed interpretations of § 271 is that of the RBOCs.[21] They seek to transform the general rule that the requirements of Track A must be satisfied before an RBOC can be granted long distance authority into a narrow exception that would mean that Track A never applies. In their view, the standards of Track A would apply only if an RBOC had received a request for interconnection and access from an

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[20] See Supplemental Initial Brief of The Staff of the Illinois Commerce Commission, pp. 11-12, Investigation Concerning Illinois Bell Telephone Company's Compliance With Section 271(c) of the Telecommunications Act of 1996, No. 96-0404 (Ill. Comm. Comm'n May 21, 1997).

[21] See Comments of Bell Atlantic, CC Docket No. 97-121 ("Bell Atlantic Comments") at 9-10; Comments of BellSouth Corporation, CC Docket No. 97-121 ("BellSouth Comments") at 5-6.

unaffiliated firm that is already providing competing exchange service to business and residential customers exclusively or predominantly over its own facilities and already satisfies the other requirements of § 271(c)(1)(A).

This claim is absurd. It is contrary to § 271's terms, its legislative history, and its purposes. Because there is no such firm anywhere in the country today, it also would mean Track A never applies.[22]

The short answer to the RBOCs is that § 271's terms neither require nor permit such a result. Section 271(c)(1)(A) provides that an RBOC cannot obtain relief under Track A unless it shows, among other things, that (1) the RBOC has entered into approved interconnection agreements in which the RBOC is providing "access and interconnection . . . to network facilities" of "competing providers of exchange services . . . to residential and business customers" (first sentence), and (2) that the "exchange services" of "such providers" are provided exclusively or predominantly over their own facilities (second sentence) and are not offered over cellular radio systems (third sentence).

In now contending that Track A never applies, the RBOCs rely on the fact that the next subsection of the Act (subparagraph B) provides that Track A is unavailable if "no such provider has requested the access and interconnection described in subparagraph A." § 271(c)(1)(B). In their view, a firm cannot be a "such provider" within the meaning of

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[22] As the Justice Department has concluded, "Such an interpretation of Section 271 would radically alter Congress' scheme, expanding Track B beyond its purpose and, for all practical purposes, reading the carefully crafted requirements of Track A out of the statute." DOJ Comments at 13.